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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1698

DOROTEA ZALDIVAR V. DE TENORIO, ET AL.,
Petitioner,

VS.

CHARLES LAVELL LIGHTSEY, ET AL.,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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vs.

CHARLES LAVELL LIGHTSEY, ET AL.,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

Since Petitioner, in her Petition for Writ of Certiorari, set out references to opinions below, made a statement of the grounds on which jurisdiction of this Court is invoked, the citation of statutory authorities, the Treaties and statutes involved and the questions presented for review, Respondent will not burden the record by repeating same.

When we make references to matters contained in the Appendix to the Petition for Writ of Certiorari, we will refer to same as "A .....". When we refer to matters contained in Volume 1 of the Appendix on file before the Fifth Circuit Court of Appeals, we will refer to same as "Apx. V. I, p. .....", and when we refer to exhibits before the United States Court of Appeals for the Fifth Circuit, we will refer to same as "Ex. Vol. II, p. .....".

STATEMENT OF THE CASE

Federal jurisdiction in this case was based upon the existence of Treaty questions. 28 U.S.C., § 1331, *Tenorio* v. *McGowan*, 364 F. Supp. 1051 (1973) (A1).

This case turned upon an interpretation of the Treaty of Friendship, Commerce and Consular Rights with the Republic of Honduras (45 Stat. 2618). Pertinent portions are set out in A72-A76. The Mississippi common law and Mississippi Code prohibited Honduran Nationals from acquiring title to property in Mississippi (Mississippi Code 1942, § 842; Code 19[illegible] 89-1-23) (A77-A78).

The land in question was acquired by Elbert J. McGowan by two deeds, one dated in 1911 and the other in 1915 (A3). About the year 1911 Elbert J. McGowan went to Central America (A3), returned to Clarke County, Mississippi, the home of his father and mother, and his brother, Hamilton E. McGowan, only twice between the year 1911 and 1936. He wrote two letters to his family during that period of time and after a visit of about a week in 1936, told his niece and brother that he was going to return to Central America and never expected to return to the United States. Thereafter no member of his family ever received any letter from him, knew of his whereabouts or saw him alive and he did not return to Clarke County, Mississippi prior to his death (Apx. V. I, p. 307-315). Between the years 1911 and 1936, H. E. McGowan used the land, paid taxes on same and did so "as a favor to his brother and for the use of said lands" (A16).

In 1940, Elbert married Maria Obdulia Zaldivar, a native Honduran woman, which marriage was not known by any member of his family until his death. On October 31,

1957, he died intestate, leaving his wife as his only heir (A3-A4).

After the death of Elbert, H. E. McGowan, his brother, received a copy of an official notice of the death of Elbert from the Consul in Panama (A5, Ex. Vol. II, p. 6) which listed the then address of the widow in Panama and other known relatives as Hamilton E. McGowan, Vossburg, Mississippi, and Milton M. McGowan, Jackson, Mississippi, brothers of the deceased. The instrument further showed that the widow had received a copy of the report of death and all of his effects were in her hands. The information contained in the report of death came from the widow who received a copy of same and who, undoubtedly, made his Passport available to the Consul upon his death (A38). There is no proof in the record that she knew of the land in question in the State of Mississippi, but she did know of his two brothers and their address (A38). One year after Elbert died, his widow returned to Honduras and no member of his family had any knowledge of her address or whereabouts (Apx. V. I, p. 271).

There was an Intestate Succession, tantamount to our administration, after the death of Elbert and his widow was declared to be the owner of all of his property, real and personal, in Panama. She was represented by counsel (A37) (Ex. Vol. II, D-1). She never communicated with either brother of the deceased, nor made any inquiry as to whether or not he left any land or estate in the State of Mississippi.

Although Petitioner states that after the death of his brother, Hamilton had the land tax assessment changed from "Elbert (E.J.) McGowan" to "The E. J. McGowan Est.", the record does not so reflect. This is a supposition on the part of Petitioner (Apx. V. I, p. 338).

After the death of his brother, Hamilton used the land in all the ways such land was susceptible of being used, claiming it as his own and paying all taxes thereon. On August 14, 1968, he brought suit in the Chancery Court of Clarke County, Mississippi, claiming that he had acquired title to the land in question by "adverse possession" and by parol gift in 1936, the last time Elbert was at home. All of the brothers and sisters of Hamilton were made parties defendant and the unknown heirs of Elbert, if any, were made parties defendant, but the widow was not made a party as such. Decree purported to confirm title in Hamilton (Ex. Vol. II, D-3).

There was no proof of a parol gift since Hamilton McGowan, the only witness who could have testified to same, was in extremely bad health, under a doctor's care and advised by his doctor that he could not testify in the case (Apx. V. I, p. 320). Even had he attempted to testify he would have been barred on objection by the "Dead Man's Statute". From about the year 1951 until up to the date of the 1968 suit, the daughter of H. E. McGowan, who handled his business, continually tried to have the assessments changed into her father's name, but was unable to do so since there was no record title in him. This evidenced hostility, not only to his brother's title, but to the widow's title after his brother's death (Apx. V. I, pp. 324-328).

Obdulia died intestate in Honduras on February 28, 1969, leaving as her sole heirs at law, her sister, Dorotea, and a brother, Felipe. She had made no effort before her death to comply with any of the provisions of the Treaty in question (A4). For an additional period of two years, the heirs of Obdulia did nothing to assert title to the land in question until oil was discovered in the area at which time she was "found" by oil men and executed an Oil

Lease on February 1, 1971, and subsequent instruments later (Ex. Vol. II, p. 9). Suit was filed in this cause on April 12, 1971, some 14 years after the death of Elbert J. McGowan.

ARGUMENT

I. General

There are no special and important reasons as required by Rule 19, Rules Supreme Court of the United States, why this Court should grant certiorari. The decision of the Court of Appeals is not in conflict with any other decision of other Courts of Appeals or of the Supreme Court.

Although the Treaty with the Republic of Honduras in question has never been construed by any Appellate Court prior to this case, the construction placed on the Treaty by the decisions in this case was essentially in accord with several other cases decided by the Supreme Court of the United States and the Supreme Courts of several states.

Petitioner argues that some twenty-three Treaties with other nations will be adversely affected by this decision as she did in her former Petition for Writ of Certiorari, which was denied - Justice Blackmun dissenting, *Tenorio* v. *McGowan*, 423 U.S. 877, 96 S.Ct. 150 (October 6, 1975). This is just not borne out by the facts and was answered ably by the Court in denying the Petition for Rehearing and Rehearing En Banc in the Fifth Circuit Court of Appeals, Per Curiam, *Tenorio* v. *McGowan*, 513 F.2d 294 (CA 5, 1975), the Court saying that this argument was not so; that this case was decided on its own peculiar facts and does not damage "the fabric of the Honduran, or any similar, Treaty" (A70).

II. The Circuit Court of Appeals in Its Former Opinions in This Case Did Construe and Pass on the Validity of the Mississippi Non-Resident Alien Statute in Relation to the Facts in This Case (§ 89-1-23, Miss. Code 1972) (A77)

An examination of the Brief of Petitioner in this cause will reflect the fact that many of the same identical arguments are made in this Petition for Writ of Certiorari which were made in the original Petition for Writ of Certiorari which was denied on October 6, 1975 (423 U.S. 877, 96 S.Ct. 150).

In the present Petition, considerable emphasis is placed upon the non-resident statute in question. Petitioner states that Section 842 of Mississippi Code 1942, now § 89-1-23, Miss. Code Ann. (1972), is discriminatory and an intrusion of the state into foreign affairs since it allows non-resident alien citizens of Syria or the Lebanese Republic to inherit property from citizens or residents of Mississippi, but denies that right to all other non-resident aliens. Petitioner uses the same novel, although specious argument, she used in the lower Court. It is said that in order to make the statute valid, the Court should read into the statute that all aliens may take property regardless of residence, in other words, judically repeal a statute which has been on the books since 1892.

It is interesting that on this point Petitioner's Brief quoted a portion of the Opinion of Judge Coleman of the Fifth Circuit, stopping her quotation at the conclusion of the words, ". . . there was no request that a three judge court be convened." What counsel did not do is to quote the balance of the paragraph which completely decides the question of whether or not the Mississippi statute was valid. Immediately after the quotation hereinabove set out, Judge Coleman said the following:

> "In any event, when the statute was last amended, Chapter 237, Laws of Mississippi of 1040, it contained the usual severability clause [Section 4]. Additionally, if the statute, as presently written, were to be invalidated, necessitating a return to the previously existing valid statute[3] the legal status of the plaintiff-appellee as a nonresident alien would remain the same. To go a step further, if all the statutes were to be set aside, the status of the non-resident alien under the common law would prohibit her owning title to land in Mississippi, Scottish American Mortgage Company v. Butler, 99 Miss. 56, 54 So. 666 (1911), 510 F.2d at 101 (A43-A44)."

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3. Lawrence v. Mississippi State Tax Commission, 162 Miss. 338, 137 So. 503; affirmed, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102, 87 A.L.R. 374.

We are not in disagreement with the holding of the Supreme Court of the United States in the cases of *Moody* v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544 (1967), and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963), which held that a three-judge court need not be convened to decide such a matter. The question of the validity of the statute was decided in the original opinion of Judge Coleman (A43-A44).

When this case appeared before the United States Court of Appeals for the last time, a unanimous panel recognized that Petitioner had attempted to attack the constitutionality of the Mississippi statute and in its opinion of February 16, 1979, stated:

> "The plaintiff also alleges that the Mississippi statute prohibiting ownership of land by an alien was unconstitutional. We disposed of that argument in our prior opinion." *Dorotea Zaldivar V. de Tenorio, et al.* v.

Charles Lavell Lightsey, et al., No. 77-1242 (CA 5) (1979) (A111).

III. The Due Process of Law Argument

Petitioner argues that the "due process of law" statement in the Treaty prevents what Petitioner calls "invidious discrimination" by state law on the basis solely of national origin, basing her argument on the fact that nonresident alien citizens of Syria or the Lebanese Republic may inherit under Mississippi law. This argument was disposed of once and for all by Judge Coleman as hereinabove stated.

At the threshold of this argument, we concede that every Treaty made by authority of the United States is superior to the Constitution or Laws of any individual state. *Hauenstein* v. *Lynham*, 100 U.S. 483, 25 L.Ed. 628 (1880); *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947).

The Treaty of Friendship, Commerce and Consular Rights between the United States and the Republic of Honduras was in effect at the time of the death of E. J. McGowan in 1957. The two Treaty Articles upon which the decision of the Fifth Circuit Court of Appeals as well as the decision of the lower Court was based, are Articles I and Article IV which are set out in the Appendix of the Petition on pages A73 and A75 and will not be repeated here.

Petitioner attempts to persuade this Court, as she did the lower Court, that Article I of the Treaty is the controlling portion. She places complete reliance upon the language which appears in Article I that the aliens involved were entitled to, "the most constant protection and security for their persons and property, * * *. Their property

shall not be taken without due process of law and without payment of just compensation." The trial Court engrafted upon Article I an additional provision not appearing therein, that until the alien had knowledge or notice of the Treaty and of his inheritance, the three year period within which to sell provided in Section IV of the Treaty would not begin to run. This was in the face of the fact that there was not one scintilla of evidence offered by Petitioner in the trial of this case, other than apparent lack of knowledge of the provisions of the Treaty or knowledge of her inheritance, to justify the prolongation of the three year term in which to dispose of the property. In effect, the lower Court completely rewrote the Treaty and judicially read out of the Treaty Article IV. The Court adjudicated that Article IV of the Treaty does not mean what it says and that similar Articles in like Treaties for more than a century should be ignored.

In the Brief of Petitioner, nothing is said about Article IV of the Treaty. The only mention of Article IV appears in Appendix D, pages A75 and A76. The Opinion of the Fifth Circuit Court of Appeals was based at least as much on Article IV of the Treaty as on Article I although the Court took into consideration both Articles.

We quote from the Opinion of Judge Coleman on this point as follows:

> "[2] The language in the last sentence of the fourth paragraph of Article I, reads, 'Their property shall not be taken without due process of law and without payment of just compensation.' This obviously refers to one of the contracting powers taking property from the citizen of the other. This is so because private parties, personal or corporate, have never had the right to take property from another. Consequently,

this limitation must be construed as referring to takings by the respective signators to the Treaty from citizens of the other. The litigation now before us does not involve expropriation, eminent domain, or any similar taking of property by governmental action." (*Tenorio* v. *McGowan*, 510 F.2d 92 [CA 5, 1975]) (A35).

Throughout this case, in both the lower Court, the Circuit Court of Appeals, the previous Petition for Writ of Certiorari, and in this Petition, Petitioner has argued that this particular Treaty is different from any other Treaty ever written and no other Treaty contains Article I and Article IV as does the Treaty in question. This just does not comport with the facts. The Treaty with Italy which was mentioned in the Mississippi case of *Guiseppe* v. *Cozzani*, 238 Miss. 273, 118 So.2d 189 (1960); 248 Miss. 588, 159 So.2d 278 (1964); and 193 So.2d 549 (1966), contained the identical provisions of Article I and Article IV of this Treaty as did the Treaty in the case of *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953 (1947). That Treaty may be found at 44 Stat. 2132. This fact was acknowledged in the opinion of the trial Court (A20).

Although Petitioner mentions *Clark*, supra, in her Petition, she actually ignores what the Court held. That was the case of a California resident who died in 1942, willing certain real and personal property to four relatives who were nationals of Germany. Six California heirs filed a Petition for determination of heirship and the Attorney General filed a suit under the Alien Property Act to escheat the property to the State. In this opinion the Court quoted Article IV which is identical with the Article here in question and after so doing specifically held:

"The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of 'any person' holding realty in the United States."

Although this case did not involve the passage of time in excess of three years, since suit was brought within one year after the deceased passed away, the Court held that the aliens' rights were the rights under Article IV of the Treaty and at page 965 stated: "In summary, we hold that disposition of the realty is governed by Article IV of the Treaty." This case held specifically that Article IV does control insofar as the realty is concerned.

Apparently Petitioner's argument is that due process under Article I of the Treaty means that Petitioner should be declared to be the owner of the property in question regardless of anything she did or failed to do and without giving any effect to Article IV of the Treaty. Due process as we construe the meaning, grants to the claimant when claim is made the right to have his day in Court, to be heard and given a chance to show cause, if any he can, why the Treaty provision should not be enforced as written and to offer proof as to why the three year period to sell should be prolonged. This is exactly what happened in this case. Petitioner has been afforded due process. She and others filed suit to secure and protect what they consider to be their property rights. They were all summoned into Court where they asserted that the provisions of the Treaty should prevail. They offered no proof as to why the three year term to sell should be "reasonably prolonged if circumstances render it necessary". They have no grounds upon which to complain about the lack of due process. Undoubtedly, the party claiming that there should be prolongation of the term

in which to sell has the burden of proof to produce facts which will justify the Court in prolonging the term. Otherwise the alien loses his rights at the end of the three year period and no longer has any title to the property in question, as was held in the opinion of the Fifth Circuit Court of Appeals.

If the alien demonstrates a lack of diligence or interest, why should not the period run as specified? Ignorance of the law is no excuse. There are numerous cases which are analogous to the present situation. One who claims property adversely does not have to notify the record owner or advise him of his legal rights.

It was encumbent upon the widow of McGowan or her heirs to take some action and do something toward selling the land within the period of time prescribed by the Treaty or present evidence of some reasonable cause other than ignorance as to why they did not do so. They did nothing. There is no evidence that anyone involved was ever misled directly, or indirectly, by H. E. McGowan, or anyone else.

As was stated very succinctly in the opinion of the Fifth Circuit Court of Appeals (A37), the widow of McGowan was represented by counsel, who, presumably advised her of her legal rights during the Intestate Succession as evidenced by Exhibits D-14 and D-1 (Ex. Vol. II). She knew the names and addresses of two of her husband's brothers yet she never made inquiry during her lifetime about anything. Certainly neither of them could have known anything about her whereabouts when she went back to Honduras in 1958, one year after the death of her husband (Apx. V. I, p. 271).

There are several cases which have construed Treaties having provisions similar to Article IV of the Honduran Treaty although no case has actually construed Article I, as such, until the present case.

One of the leading cases is the case of *Miller* v. *Clausen*, 8 Cir. (1924), 299 Fed. 723, appeal dismissed, 269 U.S. 595, 46 S.Ct. 105, 70 L.Ed. 431 (1925). The substance of this case was set out in the opinion of Judge J. P. Coleman of the Fifth Circuit Court of Appeals and will not be repeated here (A39-A40). This was the case of an unexplained lapse of five years and the Court held that there was a failure of the conditions imposed by the Treaty and that title failed by operation of law.

The general rule in this regard is stated in 3 Am.Jur. 2d, *Aliens and Citizens*, Sec. 34, p. 883, as follows:

> "* * * A reasonable time specified in a treaty within which to sell the property is, in the absence of statutory regulation, necessarily a matter of judicial construction * * *" (p. 883).
>
> "There is much discussion in the cases as to the nature of the title an alien holds under such a treaty. Some call it a base or qualified fee, and others a determinable fee. The terminology is not of controlling importance. That the right to sell carries with it the ownership as a necessary incident to the power of sale is clear. *Upon failure of the condition of sale or disposal imposed by the treaty, however, the title of the alien fails by operation of law and vests in the persons upon whom the state law would have otherwise cast it in the first instance.*" (p. 884) (Emphasis supplied).

See also the case of *Ahrans* v. *Ahrans*, Iowa, 123 N.W. 164. This involved a Treaty with no specific time stated in which the Iowa Supreme Court held that eight years without selling the property and without explanation was not a reasonable time.

Ahrans was cited with approval and followed in *Pierson* v. *Lawler,* Neb., 161 N.W. 419. This involved a Treaty with the exact language of Article IV although not Article I. This case held that an attempt to sell more than eleven years after the death of the owner was too long and that "circumstances showing a necessity for prolonging the period a sufficient length of time to uphold the conveyance from Mary Young to plaintiff are not proved" (p. 421). Exactly the same situation obtains in this case.

See also *Yeaker's Heirs* v. *Yeaker's Heirs,* 61 Ky. 33, affirmed, 19 L.Ed. 571 (1862), in which the Court held that a period of six years without selling the land and without explanation was too long to wait.

Since Article I says that aliens are entitled to "that degree of protection that is required by international law", Petitioner says she should prevail regardless of the facts.

International Law requires the protection of only that which a state allows, subject to whatever modification the Treaty affords. Mississippi allows no inheritance of realty by a Honduran national, but the Treaty in Article IV modifies this to give a Honduran national a defeasible fee. Article I, therefore, protects the Honduran national only in the ownership of his defeasible fee, which must be sold within three years. When this is lost because of his failure to act, there is nothing left for Article I to protect. The alien has lost his defeasible fee under the very terms of Article IV of the Treaty. Articles I and IV must be construed together.

See *International Law* by Charles Cheney Hyde, Second Revised Edition, Volume 1, Sec. 203, pp. 650, et seq., The Private Ownership and Control of Property.

Petitioner argues that the Treaty must be interpreted most liberally so as to award the property here in question

to her. Liberal interpretation of a Treaty does not mean changing the meaning of the entire document. One of the best statements on this point is found in the case of *Corbet* v. *Stergios,* 126 N.W.2d 342 (Iowa 1964). This case involved the construction of certain state statutes and a Treaty between the United States and Greece which had a "most favored nation clause". It was different in numerous respects from the Treaty with which we deal, yet the principle enunciated remains the same. It is interesting to note that the parties claiming the benefit of the Treaty in that case used some of the identical arguments which are used here. In answer thereto, the Iowa Supreme Court stated:

> "The fourth brief point of appellant is that treaties should be interpreted liberally so as to give effect to all rights which may reasonably be claimed thereunder. This theory of liberal treatment is considered in Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922, 6 L.Ed. 2d 218; Doehrel v. Hillmer, 102 Iowa 169, 71 N.W. 204. *Liberal interpretation is all right as to doubtful clauses, but it must not change the meaning of a treaty.* (Emphasis supplied).
>
> In the case of Doehrel v. Hillmer, supra, we said:
>
> '[W]here a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred.'
>
> *This theory is correct where two constructions are possible, but in the first place there are no two constructions to be differentiated in the case at bar, and in the second place the theory of liberality does not reach to the point of changing the clear meaning of treaties and statutes.* We are not faced with the dilemma in the instant case.

A treaty between nations is dual in purpose. It established broad political and commercial rights as between the governments of the two nations. It also grants privileges, rights and obligations between the citizens of each nation, commonly known as nationals. 87 C.J.S., Treaties, Secs. 1 and 2; 52 Am.Jur., Treaties, Sections 1 and 4.

In a judicial construction of a treaty the same general rules apply as pertain to contracts and statutes. As in such cases, the intention of the parties shall have primary consideration. 52 Am.Jur., Treaties, Section 12. In re Anderson's Estate, 166 Iowa 617, 147 N.W. 1098, 58 L.R.A. N.S., 686.

As pertaining to the case at bar some of the statements in Am.Jur., supra are relevant. '* * * a treaty should be given such a construction as will avoid unjust and unreasonable conclusions * * * * and such as tends to the common advantage of the contracting parties * * * *but not such as will put aliens on a more favorable footing than our own citizens.' Also 'The Courts are not required to * * * place an unreasonable interpretation on it, for the purpose of securing to foreigners privileges which are denied to citizens of this country.'"* (Emphasis supplied).

Our own Supreme Court follows the same view as the Iowa court as to judicial construction of treaties, contracts and statutes. In the early case of *Anderson* v. *Lewis*, (Miss. 1843) Freem. Ch. 178, our Court stated:

> "Where individual rights vest under a treaty, the meaning of the treaty, in respect to them, is to be construed by the same rules as private contracts."

The same rule of construction of statutes is in effect in Mississippi and numerous cases may be found in 13 Miss. Dig., Sec. 206, p. 318. Among these cases, is a United States Supreme Court case, *U. S.* v. *Boisdore's Heirs*, 49 U.S. 113, 8 How. 113, 12 L.Ed. 1009 (Miss. 1850), which enunciated the following rule:

> "In expounding a statute, the Supreme Court must not be guided by a single sentence or member of a sentence but must look to the provisions of the whole law and to its object and policy."

If it had not been the object and the policy of the treaty writers that an alien would have to avail himself of his opportunity to sell realty in the United States within a three year period of time, or show good cause why he did not do so, Article IV could have and would have been eliminated. Yet, it is the Article most common in dozens of treaties from our earliest history to the present time. It would have been simple for the authors of treaties to rewrite them (as the Trial Court in effect did) by omitting Article IV and insert in Article I language that, "real property can never be taken from an alien until and unless he has been notified of his inheritance, advised of his rights, has been offered the fair market value for the property and refused to accept same." The position of Petitioner and of the Trial Court just does not comport with reason and equity.

IV. No Intrusion of State Into Foreign Affairs

Petitioner alleges in this Petition as she did in her first Petition for Writ of Certiorari, that the Mississippi statute is an intrusion into foreign affairs. We believe that this is not borne out by the facts. This statute only has an incidental or indirect effect on foreign countries. *Clark* v. *Allen*, 331 U.S. 503, 67 S.Ct. 1431 (1947). This

statute does not have any direct effect of depriving a Honduran national of any inheritance.

The case of *Zschernig* v. *Miller,* 389 U.S. 429, 88 S.Ct. 664 (1968), is totally different from the case at bar. In the *Zschernig* case, the State of Oregon was attempting to have certain lands belonging to alien heirs escheated to the State. This case seems to be based largely on the concept of "confiscation" by the State which is frowned upon as being opposed to the just compensation clause of the Fifth Amendment. The facts are not analogous in any way. It approaches absurdity to say that the Mississippi statute impairs the effective exercise of the nation's foreign policy.

The case of *Hines* v *Davidowitz,* 312 U.S. 52, 61 S.Ct. 399 (1941), cited by Petitioner, is not in point in any way when examined in the light of the facts of this case. *Hines* was a case in which the State of Pennsylvania had adopted an "Alien Registration Act" laying down certain requirements and principles to which aliens in the State of Pennsylvania must conform. This was in direct contradiction of Federal Acts on alien registration and the Court held that the Federal jurisdiction took precedence over that of the State. There is no such treaty with the provisions of the instant case involved.

All of the points as to the Mississippi statute being an unconstitutional intrusion by the State into the field of foreign affairs were in the case when it was originally decided by Judge Coleman and he recognized this in his opinion (A43).

If for some reason this Court should grant certiorari and decide subsequently that the non-resident alien statute of Mississippi is unconstitutional because it allows non-resident alien citizens of Syria or the Lebanese Republic to inherit property, but denies that right to all other non-

resident aliens, the ultimate result upon a retrial would be as stated by Judge Coleman in his opinion. When the statute was last amended, being Chapter 237, *Laws of Mississippi of 1940,* it contained the usual severability clause if any clause were deemed unconstitutional. In that event, as held in *Lawrence* v. *Mississippi State Tax Commission* (supra), there would be a return to the previously existing valid statute. A Honduran native, along with Syrians and Lebanese natives, still would not inherit. If for any reason the entire statute were declared unconstitutional and this Court were to decide that no state could adopt any prohibition against inheritance by non-resident aliens (which certainly is not and could not be the case), then Mississippi would revert to the common law which prohibits any alien from owning title to land in Mississippi as enunciated in *Scottish American Mortgage Company* v. *Butler* (supra). Thus, reversal on this ground would be a vain and futile thing.

This case just could have no significant effect upon this nation's foreign affairs and its relation with those countries with which it had negotiated treaties.

V. Cases Distinguished

Petitioner cites several cases to support her contention that liberal treaty construction demands that the decision of the Fifth Circuit Court of Appeals should be reversed but these cases actually are not in point on the facts as related to this case. Numerous cases enunciate the rule that if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. None of these cases, however, hold that the Court may add to or take away from the actual terms of the treaties themselves.

The case of *Factor* v. *Laubenheimer,* 290 U.S. 276, 54 S.Ct. 191 (1933) cited by Petitioner, enunciates an abstract principle of law which is not applicable to the case at bar. That case involved the interpretation of an extradiction treaty relative to the commission of a crime.

Hauenstein v. *Lynham,* 100 U.S. 483, 25 L.Ed. 628 (1880), construed a Swiss treaty and is not in point in anywise. In this treaty the alien had the right to withdraw and export the proceeds derived from the sale of property "at all times". There was no statute of limitations. This case was discussed in the case of *Moody* v. *Hagen, et al.,* (N.D. 1917) 162 N.W. 704. The Supreme Court of North Dakota stated:

> "The case of Hauenstein v. Lynham, 100 U. S. 483, 25 L.Ed. 628, involved the estate of a citizen of Switzerland who was a resident of Virginia and the claimant was also a citizen of Switzerland. The provisions of the treaty therefore were clearly applicable to the parties, and though a liberal doctrine of construction was applied as to the express terms of the instrument, *there was no attempt to add to the treaty other terms which were not included in it.*" (Emphasis supplied).

None of the other cases discussed by Petitioner as support for the "liberal interpretation" theory have anything to do with the treaty relating to the sale of land, save and except the case of *Dutton* v. *Donahue,* 8 P.2d 90, 79 A.L.R. 1355 (Wyo. 1932). This case involved treaty provisions similar to Article IV. It did not involve a contest with local heirs who otherwise would have inherited the property after the expiration of the three year period to sell, but involved the question as to whether or not lands should escheat to the State. Essentially the decision was that, "any doubt as to whether the property is subject to escheat should be resolved against the State".

Again the Court held that the question of the reasonableness of prolongation is a matter of fact for the Courts to determine after proof.

Petitioner quotes out of context from numerous cases which support the theory of liberal construction and other matters. These cases do not relate to anything even closely akin to the facts in the case at bar. In *Asakura* v. *City of Seattle,* 265 U.S. 332, 44 S.Ct. 515 (1924), a treaty with Japan allowing Nationals to carry on "trade" was held to include the operation of a pawn shop. *Jordan* v. *Tashiro,* 278 U.S. 123, 49 S.Ct. 47 (1928) held that fishing for "commercial" purposes to carry on a "trade, wholesale and retail business", included the leasing of land, on which to construct a hospital.

Todok v. *Union State Bank of Harvard, Neb.,* 281 U.S. 449, 50 S.Ct. 363 (1930) is quoted as construing a treaty with Norway holding that "goods and effects" included land and allowed the disposition without restrictions. It is stated that this is authority for the position of Petitioner. Nothing could be further from the facts. In *Todok* the Court held that the treaty did not apply in that case. A citizen of Norway who lived in Nebraska and who claimed homestead exemption executed deeds to his homestead prior to his death. His wife, who was in Norway, did not join in the instruments, and the Court held that the treaty did not make valid the conveyances since the absent spouse did not join in the conveyances and the deeds were void.

We have no quarrel with the quotation from the case of *Sullivan* v. *Kidd,* 254 U.S. 433, 41 S.Ct. 158 (1920) which stated that "* * * All parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole" (254 U.S. 439). This case is not in point on its facts. A reasonable construction

of the Honduran Treaty on the facts of our case could lead only to the ultimate result reached by the Fifth Circuit.

The quotation from *DeGeoffroy* v. *Riggs*, 133 U.S. 258, 10 S.Ct. 295 (1890) is a good abstract statement of treaty construction which has nothing to do with this case.

The case of *Johnson* v. *Robison*, 94 S.Ct. 1160 (1974), cited by Petitioner has no place in this brief. This was the case of a conscientious objector to military service who performed civilian service. Upon being denied educational benefits such as military veterans were entitled to receive, he brought a class action. The lower Court held that there could be judicial review of decisions of the Administrator of Veterans' Affairs on this question of law and fact and that failure to grant benefits violated the guarantee of religious freedom and equal protection of the laws. The Supreme Court held that the sections of the law which prohibited the objector from participating in educational benefits did not violate the guarantee of religious freedom nor deny him equal protection of the laws. This has nothing to do with treaty interpretation.

The cases of *Quong Ham Wah Co.* v. *Industrial Accident Commission*, 192 Pac. 1021, 12 A.L.R. 1190, error dism., 255 U.S. 445, 41 S.Ct. 373 (Cal. 1920), *Sugarman* v. *Dougall, et al.*, 413 U.S. 634, 93 S.Ct. 2842 (1973) and *Weinberger* v. *Wisenfeld*, 95 S.Ct. 1225 (1975) do not involve the construction of treaties. The *Quong* case involves the extension of workmen's compensation benefits to an alien worker as if he had been a citizen of the State of California. *Sugarman* provided that a resident alien could take a civil service examination and hold a civil service position. *Weinberger* granted social security benefits to widowers as well as to widows. The cases have no application to the case at bar.

CONCLUSION

From the very beginning of this case, there has been much talk and lip service as well as legal argument about the rights of aliens, and particularly the aliens involved herein. This Court and the other Courts have heard much about "due process of Law", "notice", "fair play", "nondiscrimination", "liberal construction of treaties". To put the matter in perspective, the Court must remember that for sixty years Hamilton McGowan occupied, used and for most of said period thought he owned the land, which was ordinary farmland. Had this land not become valuable for oil discovered on the property shortly after this suit was filed, the so-called alien heirs might have lived in Honduras or elsewhere for a hundred years and no one would have ever questioned the title of Hamilton McGowan, or his heirs. It was only after the property became valuable for oil that those who will profit most if Tenorio wins this suit began the search for the aliens. All at once these philanthropic minded Mississippians became extremely concerned that the rights of ignorant, non-English speaking aliens be protected and preserved. Fourteen years of doing nothing should be ignored in the interest of fair play and nondiscrimination, regardless of Treaty provisions.

Perhaps no one could have expressed the reasoning behind this lawsuit better than the Petitioner at page 15 of her first Brief filed before the United States Fifth Circuit Court of Appeals. Her stated reasons are most interesting.[1]

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1. "From the circumstances in evidence, as outlined by the District Court, the inference is inescapable, and the District Court so held, that Obdulia was ignorant of her Clarke County inheritance from her husband, but even if she had known that

(Continued on following page)

Petitioner in the statement from her brief, set out herein, finally "told it like it is." For fourteen years the value of the land didn't justify the expense or effort to claim same. It wasn't worth the gamble. However, when the property became valuable for oil purposes, interested oil men unearthed the aliens and became extremely solicitous of their welfare. They were willing to and are bearing all the expense of this suit for a period of more than eight years, even to the Supreme Court of the United States twice.[2] It was then that prolongation became vitally necessary, something at long last must be done to protect the rights of aliens, for "it was now worth the gamble".

It is interesting to note that Judge Skelton who wrote the unanimous opinion of February 16, 1979, in this case (*Tenorio, et al.* v. *Lightsey, et al.*, No. 77-1242 (CA 5, 1979)) (A106) in a note to his opinion stated: "This case has run the full course of our Federal Judiciary." Judge Skelton then proceeded to document all of the ramifications

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Footnote continued—

the land existed as an asset of her husband's estate, the difficulties that she would likely have encountered in selling the land at a fair price or at any price, during the eleven-year space of her life after Elbert's death, would have been insurmountable. *In the first place, the value of the land, so far as then known, was limited to its utility for farming or pasture—hardly enough to even pay the expense of investigation by one in Central America. In the second place, any effort in this direction, as it now appears, would have been met with the opposition of Hamilton, who was in physical possession and this alone would have made the title unmerchantable, for no one for so little would have gambled so much.*" (Brief of Petitioner, 5 Cir., p. 15) (Emphasis supplied).

2. "Q. [by respondents' counsel]:

Mrs. Tenorio, who is financing this lawsuit for you?

"A. The company, the lawyer, I imagine.

"Q. Mrs. Tenorio, you have not spent any money of your own in order to come from your home in Honduras to participate in this trial, have you?

"A. No." (Apx. V. 1, p. 287).

of this long, drawn-out case, giving every indication that he thought that this case has been in the Courts long enough, as do we.

We believe that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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